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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 970

BINKLEY MINING COMPANY OF MISSOURI,
Petitioner,

vs.

DAN H. WHEELER, Acting Director Bituminous Coal Division, Department of the Interior, HAROLD L. ICKES, Secretary of the Interior.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Henry Adamson,
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vs.

DAN H. WHEELER, ACTING DIRECTOR BITUMINOUS COAL DIVISION, DEPARTMENT OF THE INTERIOR, HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner herein respectfully presents to this court its petition for Writ of Certiorari, as follows:

Jurisdiction.

1. Jurisdiction in this cause is based upon Judicial Code, section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A. Title 28, section 347) and upon sec-

tion 6 (b) 50 Stat. 85 (Title 15, U. S. C. A. section 836, paragraph b) of the Bituminous Coal Act of 1937.

2. The date of the original judgment to be reviewed is February 10, 1943 (R. 152). Petition for rehearing was filed February 25, 1943 (R. 177) within the time for filing petitions for rehearing provided by the rules of the United States Circuit Court of Appeals, Eighth Circuit, and was denied March 5, 1943 (R. 179).

Summary Statement of Matter Involved.

This cause presents fundamental questions with reference to the powers and duties of the Bituminous Coal Division, Department of the Interior, in the daily administration of the coal code set up by the Bituminous Coal Act of 1937, approved April 26, 1937, 50 Stat. 72-90 (15 U. S. C. A. 828-851) and challenges, as being inconsistent with the manifest intent of the Act, the basic theory of administration of the code adopted and carried out by the Bituminous Coal Division in its daily administration of the code. (Sections 4-II(e), 4-II(j), 5(b) and 6(a) of the Bituminous Coal Act of 1937, being the sections involved in this cause, are printed in full in appendix hereto).

The Bituminous Coal Act of 1937 is cast in a form entirely new and different from any other regulatory statute theretofore enacted, sets up a voluntary code applicable to coal producers accepting the code and to none other; was not intended as a rigid regulatory act, and provides methods of requiring compliance by coal producers who accept the code. Section 4 of the Act sets up the code and section 4-II(j) grants certain specified persons and entities the right to require compliance with the code by filing written complaint of a violation with the Bituminous Coal Division. Section 5(a) makes provision for accepting the code and section 5(b) provides for revocation of code mem-

bership or issuance of cease and desist order upon written complaint of *wilful violation* filed by specified persons or entities and after hearing.

June 12, 1941, the Secretary of the Bituminous Coal Producers Board for District 15, one of the entities qualified under the specific provisions of the Act to file complaint, upon information furnished by the Bituminous Coal Division, filed written complaint with the Bituminous Coal Division charging Petitioner with "wilful violation" of the code prices and praying revocation of Petitioner's code membership or, in the alternative, issuance of cease and desist order (R. 10-14). Petitioner filed answer (R. 18-19); complainant filed written request for withdrawal of complaint, which was denied (R. 19-25); complainant and petitioner filed joint stipulation of dismissal, which was denied (R. 26); hearing before Examiner of Bituminous Coal Division. Complainant introduced in evidence certified copy of District Board 15's resolution directing withdrawal of complaint and rested (R. 27-35). Bituminous Coal Division, over the objection of Petitioner, was permitted to prosecute complaint and introduce evidence (R. 35-39). Motion to strike all evidence introduced by the Bituminous Coal Division was made at the conclusion of the hearing and overruled (R. 115). Examiner made report, so-called findings and recommendations, finding petitioner guilty of wilful violation of the code (R. 116-123). Petitioner filed exceptions to Examiner's report contending that complainant had absolute right to withdraw complaint; that complainant had the absolute right to stipulate for dismissal of complaint; that the Coal Division had no authority to introduce evidence and be heard at the hearing; that there was a total lack of findings sufficient to sustain the recommendations; that the evidence was insufficient to sustain a finding of wilful violation and request oral argument on the excep-

tions (R. 127-131). Director of the Bituminous Coal Division, on June 4, 1942, denied request for oral argument, overruled exceptions of Petitioner, adopted recommendations of the Examiner and ordered the Petitioner to cease and desist and be permanently enjoined and restrained from selling coal at less than applicable effective minimum prices (R. 140-148). Examiner and Director of the Bituminous Coal Division throughout the proceedings have erroneously referred to the complaint as filed "pursuant to the provisions of section 4-II(j) and 5(b) of the Bituminous Coal Act of 1937" (R. 116 and 140), and apparently made their decision upon the theory that section 4-II(j) and 5(b) of the Act cover the same subject matter and authorize revocation of the code membership or the issuance of cease and desist order for mere violation. Petitioner on July 16, 1942, filed its petition to review the order of the Bituminous Coal Division in the United States Circuit Court of Appeals for the Eighth Circuit, and on February 10, 1943, the Circuit Court of Appeals for the Eighth Circuit rendered its opinion and decision affirming the action of the Bituminous Coal Division, and in its opinion and decision held:

1. That the complaint filed by the Bituminous Coal Producers Board for District 15 was a public proceedings and not a private proceedings (R. 164-165).

2. That it was within the discretion of the Division to cause the proof to be offered and have the matter proceeded with (R. 166).

3. That "wilful violation" as used in section 5(b) of the Act "Was designed to describe the attitude of a code member skilled in the coal selling art and familiar with its practice, who having the free will and choice, intentionally and knowingly either omits to do what is required of him in

disregard of the code provisions or acts affirmatively with manifest indifference to its requirements," and further held that "under the circumstances, inquiry becomes a duty, and he may reasonably be charged with the knowledge he would have obtained had the required inquiry been made" (R. 168).

4. That both the Examiner and the Director should be criticized for their disorderliness in not making explicit findings of the evidentiary facts (R. 169).

On February 25, 1943, Petitioner herein filed its Petition for Rehearing, which said petition was, on March 5, 1943, denied by the United States Circuit Court of Appeals for the Eighth Circuit (R. 179).

Evidence.

The facts are undisputed and disclose the following:

Petitioner is a code member operating a mine in the State of Missouri, producing on an average of approximately 300,000 tons of coal per year (R. 96). Coal produced by Petitioner is shipped to numerous marketing areas and each marketing area has a different price on each size and for different sizes (R. 97). The industrial use rule was in effect and applies "where the coal moves directly from the mine of the producer to the consumer using the fuel principally for (1) the purpose of driving steam engines or turbines (2) the purpose of manufacturing or processing if fuel is required each day of the year products of the consumer are produced" (R. 122). The Western Tablet and Stationery Company operates a plant at St. Joseph, Missouri, for the manufacture of school tablets, writing tablets, loose leaf fillers, school binders, stationery, envelopes, notebooks, stenographers' notebooks and other items, employing from 700 to 850 employees; power plant at the Western

Tablet and Stationery Company consists of two big 236 H.P. Sterling boilers (R. 43-66, R. 73-80, R. 82). Defendant, Binkley Mining Company of Missouri, through its subsales agent, made contract for sale of coal to the Western Tablet and Stationery Company for the period covering April 1, 1940, to March 31, 1941, at $1.63 per ton (R. 51). Coal produced by the defendant, Binkley Mining Company of Missouri, was sold by Southwest Coal Company as its agent, and Binkley Coal Company as sub-agents of the Southwest Coal Company (R. 92). Prior to fixing of prices by Coal Division, October 1, 1940, and under similar classification between industrial and space heating differential, defendant followed an established practice of selling coal to the Western Tablet and Stationery Company on an industrial basis and not on a space heating basis (R. 87 and 93). Western Tablet and Stationery Company consumes coal at least six months out of the year solely for the purpose of processing, and six months out of the year it was used for both processing and heating purposes (R. 67-78, 76 and 113). Coal is used for generating steam for processing purposes every day the plant runs and about three tons per day are consumed for processing purposes every day the plant runs (R. 67, 79). Total amount of coal used during calendar year for processing and heating is around 2,000 tons, and plant runs on an average of about 325 days a year (R. 79). Price fixing by the Coal Division went into effect October 1, 1940, and copy of contract with Western Tablet and Stationery Company was filed with the Statistical Bureau of the Coal Division (R. 95); that industrial prices fixed by the Coal Division were fixed at $1.63 per ton for the class and kind of coal used by Western Tablet and Stationery Company or at the same price as prevailed prior to the fixing of prices (R. 66). Sales agent and officials of defendant had no knowledge or information that the coal sold to Western Tablet and Stationery Company should

take space heating price during the life of existing contract, and had no knowledge that it had been classified as a space heating plant until they renewed the contract on the same basis as the old contract, about April 1, 1941, when new, signed contract was sent to the Southwest Coal Company and the defendant was notified by Southwest Coal Company that Western Tablet and Stationery Company plant had been classified as a space heating plant (R. 95-96); that the then proposed contract at industrial prices was canceled and new contract was made at space heating prices and filed with the Statistical Bureau (R. 95-96); that under similar classification, prior to code prices, Southwest Coal Company classified Western Tablet and Stationery plant as an industrial plant, and sales agent still thinks it is an industrial plant (R. 93). Sales agent of defendant has instructed all salesmen to comply with the law in every respect (R. 96), and defendant had no intention of violating any price fixed or any rule or regulation (R. 96).

Questions Presented.

1. Was it the intent of Congress, in the passage of the Bituminous Coal Act of 1937, to set up a voluntary code to be administered as a corrective and cooperative measure by the coal industry itself under the supervision of a governmental agency, or was it the intent of Congress to set up a rigid, highly penal, regulatory measure to be enforced by the Coal Division of its own motion?

2. Does the Act confer upon the Division the authority to make investigation of either violations or wilful violations and, upon its own motion, institute enforcement proceedings under the Act?

3. Does the method provided by section 5(b) of the Act for requiring compliance with the code establish a proceedings public or private in its nature?

4. Is the Division authorized, upon written complaint charging wilful violation filed by one of the complainants specifically authorized to file complaint by section 5(b) of the Act (no other party specifically authorized by the Act to present evidence and be heard having intervened or become a party) to, in its own name and behalf, prosecute, hear and determine the complaint, notwithstanding the filing of a request by the sole complainant to withdraw the complaint and notwithstanding the joint motion of the complainant and defendant to dismiss complaint, or is the Division, by the terms of the Act itself, limited to hearing and determining?

5. Does the power delegated by section 5(b) of the Act to the Division to revoke membership in the code or issue cease and desist order upon proof that such member has "wilfully violated" any provision of the code or any regulation made thereunder confer upon the Division power to revoke code membership or issue cease and desist order in any case other than where the violation was proven to be with knowledge, intentional and deliberate?

6. Does the so-called opinion of the Director contain findings to support a decision of wilful violation?

7. Is there any substantial evidence in the record to sustain the Director's findings of wilful violation?

Reasons Why Petition Should Be Granted.

This cause presents to this Court, for the first time, fundamental matters of both substance and procedure in connection with the administration of the Bituminous Coal Act of 1937:

1. Questions presented require a consideration of the whole scheme of regulation as set forth in the Bituminous Coal Act of 1937. The Bituminous Coal Code, while of a

regulatory nature, is set up in the Act as a purely voluntary code and the scheme of regulation set forth in the Act is entirely different from any scheme of regulation heretofore attempted. While there is no specific general grant of power to the Division to investigate and enforce the provisions of the Act against code members, the Bituminous Coal Division has apparently inferred from the Act that it has been granted such general powers and has proceeded to administer the Act accordingly. The Board has set up machinery for investigation and has insisted upon a rigid and scrupulous compliance with the code provisions; has apparently acted upon the theory that the voluntary code is a highly penal, regulatory act. The Attorney General's Committee of Administrative Procedure in Monograph No. 23, Vol. 1, in note 5 on page 2, in referring to the Bituminous Coal Act, makes the following statement:

> "It is worth noting that the statute is more an example of federal assistance than of federal regulation."

The Petitioner contended before the Bituminous Coal Division and in the Circuit Court of Appeals for the Eighth Circuit, and now contends that the code set up is cooperative and corrective and not penal; that the history of the enactment and the intent of the Act itself is that the stabilization of the coal industry shall be accomplished by the coal industry itself under the supervision of governmental agency and that the code should be administered in a cooperative and corrective manner and not as a highly penal regulation; that the Bituminous Coal Division is exercising powers not delegated to it by the Act, either directly or inferentially. This presents to this Court not alone question of extent of power of enforcement delegated by the Act to the Bituminous Coal Division, but also the question of whether or not the code, as adopted, is being administered in the spirit in which it was written and with the

intent manifest from the language of the Act, directly affects every code member and directly affects every action taken by the Bituminous Coal Division in the administration of the code provisions of the Act. To borrow an expression from a recent opinion of this Court, "The question presented looms large in the administration of the Act."

2. Cause also presents question of the extent of the powers delegated to the Bituminous Coal Division, of its own motion, to require compliance with the code by code members. Section 5 (b) of the Act specifically authorizes any code member or district board or any state or political subdivision of a state or the Consumers Counsel to file written complaint of wilful violations of the provisions or the regulations adopted thereunder, specifically provides that at any hearing on the complaint any code member or district board or any state or political subdivision of a state or the Consumers Counsel or any consumer or employee and the Commissioner of Internal Revenue shall be entitled to present evidence and be heard. Notwithstanding the above specific provisions, the Bituminous Coal Division has, without becoming a party to the proceeding and in the face of the complainant's request to withdraw the complaint, exercised the authority to, in its own name and behalf, introduce evidence and prosecute the complaint and proceed with the determination of whether or not a wilful violation has been committed. The Circuit Court of Appeals for the Eighth Circuit affirmed this action apparently upon the theory that the complaint was public and not private and comes within the provisions of section 6 (a) of the Act. It is the contention of the Petitioner that the complaint was individual and private; that complainant was exercising a discretionary personal right given it by the Act; that the complainant did not represent the public or any public

interest and that complainant had a right to control the litigation and withdraw or dismiss the proceedings at any time prior to judgment. It is fundamental in our system of government that administrative agencies should exercise only such powers as are delegated to them. It is important in the administration of this Act that the question of whether or not the Bituminous Coal Division has, by the Act, been granted this broad authority to prosecute, hear and determine be authoritatively settled by this court. Authoritative settlement of this question is essential to the proper administration of the Act and is essential in order that the District Boards and other persons and entities engaged in the administration of the Code set up by the Act may know and properly perform the functions delegated to them under the terms of the Act.

3. An authoritative determination of the meaning of the words "wilful violation" in section 5 (b) of the Act is essential to the orderly functioning of the code governing the marketing of the millions of tons of coal produced by the code members. Code members are entitled to know with certainty when they may be subject to the harsh expedient of revocation or cease and desist order. The Bituminous Coal Act of 1937 by section 4-II (j) provides a method for enforcing the obligation of compliance by a code member where *violation* is charged, and section 5 (b) provides a method for enforcing compliance wherein *wilful violation* is charged. Under the construction given the Act by the Director of the Bituminous Coal Division in this cause and affirmed by the Circuit Court of Appeals for the Eighth Circuit, to all practical intents and purposes any violation becomes a "wilful violation". The Act in none of its provisions provides a penalty, as a penalty. The Bituminous Coal Division, however, have by their construction converted the revocation and cease and desist provision of

section 5 (b) of the Act into a method of assessing penalties where none were provided and none were intended. This method of penalizing has become an integral part of the Bituminous Coal Division's administration of the Act and is used almost daily. Surely the question of whether or not such a construction of the Act is within the terms and within the intent of Congress is of vital importance to every code member and should be authoritatively decided by this court.

4. The best that can be said of the evidence in this case is that it shows a violation of the price provisions of the code by reason of an honest mistake. Conviction of wilful violation of the code under the provisions of the Act could not be bottomed upon such evidence. The question of the meaning of the term "wilful violation" in the Act has never been presented to nor determined by this Court. The records of the Bituminous Coal Division disclose that hundreds of charges of wilful violation have been filed with the Board. Orderly administration of the Act requires an authoritative determination of the meaning of the word "wilful" as used in section 5 (b) of the Bituminous Coal Act of 1937.

5. There are no findings of fact by the Director but he does file a written opinion which consists of argument and interspersed therein are portions in which he makes findings, and the Circuit Court of Appeals for the Eighth Circuit, in its opinion, says that both the report of the Examiner and the opinion of the Director should be criticized for their disorderliness in that both have failed in several instances to follow up their discussion of evidence with explicit findings of the evidentiary facts deduced from such evidence. The Act requires a finding of facts and these should be required in order that this court might know the

ultimate facts upon which this cause was decided by the Director.

Florida v. *United States*, 282 U. S. 194.
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.
United States v. *Shoshone Tribe*, 304 U. S. 111.

6. The importance of reviewing the questions presented would seem manifest from the fact that in addition to other questions of importance hereinabove set out, the entire theory of the administration of the Bituminous Coal Code by the administrative authority set up under the Act is properly challenged in this cause.

Wherefore, it is respectfully submitted that this petition should be granted and that this court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and, upon final consideration, reverse said cause.

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BINKLEY MINING COMPANY OF MISSOURI,
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vs.

DAN H. WHEELER, Acting Director Bituminous Coal Division, Department of the Interior, HAROLD L. ICKES, Secretary of the Interior,
Respondents.

BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

An opinion in the above entitled cause was written and filed by the Acting Director of the Bituminous Coal Division, Department of the Interior, and appears in the printed record filed herein at page R. 140-148. An opinion was also written in the above cause by Judge Woodrough of the United States Circuit Court of Appeals for the Eighth Circuit, Sanborn and Thomas, Circuit Judges, concurring, and was filed February 10, 1943, and appears at pages R. 152-170 of the record. The Court's opinion is also reported in 133 F. (2d) pages 863-872.

II.

Jurisdiction.

1. Jurisdiction in this cause is based upon Judicial Code, section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (USCA Title 28, section 347) and upon section 6(b) 50 Stat. 85 (USCA Title 15, section 836, paragraph b) of the Bituminous Coal Act of 1937.

2. The date of the original judgment to be reviewed is February 10, 1943 (R. 152). Petition for rehearing was filed February 25, 1943, (R. 177) within the time for filing petitions for rehearing provided by the rules of the United States Circuit Court of Appeals, Eighth Circuit, and was denied March 5, 1943 (R. 179).

III.

Evidence.

A sufficient summary of the facts to present the questions involved is presented in the attached Petition for Writ of Certiorari. We do desire to call the Court's attention to the fact that the evidence is undisputed and came entirely from witnesses produced by the Coal Division "to sustain the issues in its behalf" (R. 39).

IV.

ARGUMENT.

The Circuit Court of Appeals erred in holding that the Bituminous Coal Act of 1937 charged the Bituminous Coal Division with the duty of fixing, maintaining and enforcing code prices.

1. The Bituminous Coal Act of 1937 stems from the original Coal Conservation Act of 1935 and, with certain

labor provisions eliminated on account of the decision of this court in *Carter* vs. *Carter Coal Company*, 298 U. S. 238 (1936) is substantially the same as the original Act. Extensive hearings were held on the original Act before a subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, first session, and a perusal of the evidence adduced at these hearings establishes, beyond peradventure of a doubt, that the Bituminous Coal Act was conceived and written by the coal industry itself; it has been held uniformly that the principal object of the Act was to eliminate the evil of cut-throat competition and to stabilize the industry. The industry, acting on its own, could not stabilize the markets through price fixing agreements without running afoul of the Sherman Act. The scheme of regulation provided in the Act is unlike any other heretofore considered by this Court; the regulatory provisions are not in the form of rigid prohibitions. Membership in the code (and the code is the heart of the regulatory measure) is voluntary. District Boards composed solely of representatives of the coal industry are set up, not as governmental agencies, but as separate entities with definite functions to perform, all under the surveillance of the Bituminous Coal Division. The provisions of the Act unmistakably indicate that the district boards were to play a large part in the administration of the Act. Mr. Henry Warrum, author of the Act, testifying before the sub-committee at the hearing on HR-8479, supra, said as much in no uncertain words.[1]

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[1] In answer to the direct question "What are the duties of the District Board? What do they do?" Mr. Warrum made the answer: "They do practically everything in connection with the administration of this Act." (See report of hearings before sub-committee of the Committee on Ways and Means, House of Representatives, 74th Congress, first session on HR-8479, page 65.) The Attorney General's Committee on Administrative Procedure, in Monograph No. 23, Vol. 1, note 5 on page 2, makes the comment, "It is worth noting that the statute is more an example of federal assistance than of federal regulation."

Notwithstanding the manifest intent gathered from the legislative history of the Act, and notwithstanding the fact that the Act itself contains no delegation of the general power of enforcement, the Bituminous Coal Division has construed the Act to charge it with the duty not only of establishing a minimum price structure for the Bituminous coal industry but also with the duty of a rigid enforcement of the provisions of the code. Nothing in this Act even suggests such a broad delegation of power. In this connection it is to be noted that no penalty, as a penalty, is fixed by any of the terms of the Act for any violation of the code.[2]

The Act makes specific provision for requiring compliance with the code. Section 4-II (j), which is part and parcel of the code itself, provides for written complaint by any code member, district board or member thereof, state or political subdivision of a state or the Consumers Counsel, charging a *violation* of the code, and makes it the mandatory duty of the Commission to make due effort toward adjustment of such complaint and to endeavor to compose the difference of the parties, and delegates to the Commission the power to make such order or orders as

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[2] In the debate in Congress on the passage of the original bill, Congressman Samuel B. Hill, in the House Congressional Record, Vol. 79, part 12, page 13445, used the following language: "This is not an imposed code, this is a voluntary code. The code provided for * * * * * shall be binding upon those who sign the code and none other * * * * You will recall that under NRA 75% of the industry signing a code made it binding upon the members of the industry. That is not true in this case. Only those members who sign a code are bound by it and the basis of enforcement of the terms of the code is the contract of mutual obligation to which they subscribe in signing the code * * * * THE CODE ITSELF IS A MATTER OF VOLUNTARY AGREEMENT AND THERE IS NOT A SINGLE PENAL PROVISION IN IT." And Congressman Underwood, in speaking for the bill, House Congressional Record, Vol. 79, part 12, page 13474, made the following statement: "The Guffey-Snyder coal bill provides for a minimum amount of governmental regulation to insure the orderly conduct and stabilization of the Bituminous coal industry."

the facts and circumstances warrant. It is to be noted that this method of requiring compliance with the code creates a right in all persons interested or who might be interested in the code member's compliance, and it is also to be noted that this method of requiring compliance is entirely consistent with the theory of a self-regulated industry under government supervision and not a rigid statutory prohibition. Section 5 (b) of the Act delegates to the Bituminous Coal Division the power to revoke code membership or issue cease and desist order upon written complaint by any code member, district board or any state or political subdivision of a state or the Consumers Counsel after a hearing upon proof that the code member has *wilfully* violated any provision of the code or any regulation made thereunder, and further provides that at such hearing, in addition to the qualified complainants, any consumer or employee and the Commissioner of Internal Revenue shall be entitled to present evidence and be heard. This provision is entirely consistent with the theory of self regulation under Government supervision, and was apparently intended to permit the designated persons to require compliance with the code by those members of the code who proved recalcitrant, was clearly intended to be used only in flagrant cases of violation. The Coal Division, however, has insisted upon construing 4-II (j) and 5 (b) together,[3] and has construed the powers granted in section 5 (b) as applicable to section 4-II (j) and has, in the daily administration of the Act, acted upon that construction. The Circuit Court of Appeals, Eighth Circuit, have apparently overlooked the fact that 4-II (j) is the provision applicable

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[3] Memorandum opinion of Director (R. 140-143) contains the following statement:

"These proceedings were instituted upon complaints filed with the Bituminous Coal Division ("Division") on June 12, 1941, pursuant to the provisions of section 4-II(j) and 5(b) of the Bituminous Coal Act of 1937."

in the event of "violation" and 5 (b) is applicable in the event of "wilful violation", and have affirmed the Coal Division in its construction. The Coal Division, by such a construction, has endeavored to supply a penalty where none was intended and the manifest intent of Congress was otherwise. Obviously it is of the utmost importance to every member of the code and to the Coal Division that they authoritatively know whether or not the Division has been delegated the broad power, upon its own motion, to insist upon a rigid and scrupulous compliance with the code, and whether or not a mere mistake will subject a code member to the harsh proceedings provided in section 5 (b), which may result in the revocation of his code membership and the payment of a substantial penalty, or the issuance of a cease and desist order. It is quite important that the district boards, code members and Consumers' Counsel know definitely their place in the scheme of regulation provided by the Act.

The Circuit Court of Appeals erred in holding that the Act conferred upon the Division any authority to enforce the provisions of the code of its own motion.

2. The only general authority conferred upon the Commission is the authority to make and promulgate all reasonable rules and regulations for carrying out the provisions of the Act. None of the provisions of the Act delegate any general power to enforce the provisions of the code. As a matter of fact, specific provisions to enforce compliance with the code are set out in Section 4-II (j) of the code itself, and section 5 (b) hereinabove referred to and these provisions specifically limit the power to file written complaints of either *violation* or *wilful* violation to the persons specifically designated in the act as qualified complainants. It is noticeable that the Bituminous Coal Commission or Bituminous Coal Division are not among those

named as qualified complainants or as authorized to present evidence and be heard at the hearings. It is also to be noted that the delegation of the right to file complaints is not delegated to the district board alone, is not mandatory but is discretionary and delegated to the District Board, any code member, any state or political subdivision of a state or the Consumers' Counsel; it would seem of prime importance in the administration of this Act that this court give an authoritative decision of this question, to the end that the Act may be administered within the purpose and intent of Congress in its enactment.

The Circuit Court of Appeals erred in holding that the Division was authorized by the Bituminous Coal Act of 1937, in its own name and on its own behalf, to prosecute, hear and determine a written complaint filed by an authorized complainant, notwithstanding the filing of a request by the sole complainant to withdraw the complaint, and notwithstanding the joint motion of the complainant and defendant to dismiss the complaint.

3. This record discloses that the complainant filed the complaint on information furnished by the consuming area auditor of the Bituminous Coal Division (R. 10). It also discloses that after the signing of the complaint by the Secretary of the District Board, the District Board held a meeting and considered the charges and the evidence in relation thereto, and came to the conclusion that no wilful intent to violate the Act was involved, and directed the Secretary to move for the withdrawal of the charge heretofore filed (R. 19-23). The Secretary moved for the withdrawal of the charge and the motion was denied by the Director (R. 24). At the hearing the only evidence introduced by the complainant was a certified copy of the resolution authorizing the withdrawal of the charge. The Coal

Division in its own behalf was then permitted, over objection, to introduce evidence "to sustain issues in its behalf" (R. 39). The complaint under consideration was clearly filed under section 5 (b) (R. 10); the complainant was not a governmental agency nor was it in any wise representing the public. It was, as constituted by the Act itself, a separate entity made up of persons interested in the coal industry, and exercising a private right conferred by the Act. No provision of this section or any other section of the Act makes provision whereby the Bituminous Coal Division could become a party to the proceedings with the right to produce evidence and be heard. The Director in his memorandum opinion seemed to rely upon necessity (R. 147). The Circuit Court of Appeals for the Eighth Circuit based its opinion upon the public interest involved, and also upon the provisions of section 6 (a). The Attorney General's Committee on Administrative Procedure, in Monograph No. 23, Vol. No. 2, on page 99 expressed some doubt as to the extent intended by the provision in section 6 (a) and suggests the wisdom of testing the possibilities of this section in court. The question suggested undoubtedly arises daily in the administration of the Act and should be authoritatively settled by this court.

The Circuit Court of Appeals, in its decision, relies upon the following cases: *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 8th Circuit, 105 F. (2d) 559 l. c. 566; *Resources Corporation International* v. *Securities and Exchange Commission* (App. D. C. 1939), 103 F. (2d) 929; *Oklahoma-Texas Trust Co.* v. *Securities and Exchange Commission,* 10th Circuit, 100 F. (2d) 888-892; *Securities and Exchange Commission* v. *Hoover* (N. D. Ill.), 25 Fed. Supp. 484; In the matter of *Winnebago Distilling Co.,* 6 S. E. C. 926; In the matter of *Paper Sales Co. of Detroit* (Ind.), 2 S. E. C. 748. The first case above cited arises under the Bituminous Coal Act, but is clearly dis-

tinguishable from the present cause. It deals with a specific grant of power to the Coal Division. No such grant is involved in the present cause. All of the other cases cited deal with various constructions of the Securities and Exchange Act and are not in point by reason of the fact that they deal with a rigid, prohibitory, regulatory measure entirely different in both purpose and procedure from the act under consideration.

The Circuit Court of Appeals erred in its construction of the term "wilful violation" as used in section 5(b) of the Act.

4. Ordinarily, the use of the word "wilful" means intentional or deliberate. It would seem obvious that in section 5(b) of the Act it is used in its ordinary sense, since section 4-II(j) provides a method of requiring compliance with the code where violation only is concerned. It would seem clear that section 4-II(j) was intended to cover those cases involving mere violations of the code. It would seem equally clear that in the event a code member deliberately and intentionally violated the code, section 5(b) was intended as a rather harsh method of compelling compliance with the code (*Spies* v. *United States* (1943), — U. S. —, 87 L. Ed. 342 (Advance sheets)). Obviously the two sections were intended to be applicable to different factual situations, and the remedy for enforcement under the different facts was intended to be entirely different; the first mild and corrective, the second harsh and coercive. The Coal Division seems to insist on a construction that the two sections are the same and the Circuit Court of Appeals apparently concurs in this construction. Such a construction would not only be in conflict with all settled rules of construction, but is in direct conflict with the terms of the Act itself. Surely code members are entitled to know when they may be sub-

ject to a revocation of their code membership or the issuance of a cease and desist order.

The Circuit Court of Appeals erred in holding that there was sufficient finding of facts to support the director's conclusion.

5. While this might not, of itself, be sufficient to justify the issuance of a Writ of Certiorari from this court, we think that it is important that the requirements of the law as to findings of fact be at least substantially complied with. Administrative officers and bodies are required by reviewing courts to express their decision in formal and explicit findings of fact, to the end that the review may be intelligent, and we respectfully submit that no findings of fact, justifying the conclusion that the regulations had been wilfully violated, appear in the Director's findings or opinion. *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Baltimore & Ohio R. R.,* 293 U. S. 454; *United States* v. *Shoshone Tribe,* 304 U. S. 111; *Interstate Circuit Inc.* v. *United States,* 304 U. S. 55.

The Circuit Court of Appeals erred in holding that there was substantial evidence to support finding of wilful violation.

6. There is in this record no substantial evidence to support the conclusion of a "wilful violation" of the code. The undisputed evidence in this record discloses that if there was a violation of the minimum price fixed by the Coal Division, it was solely by reason of a mistake on the part of the Petitioner as to the applicable price and was neither intentional nor deliberate. The finding of "wilful violation" against a code member and the issuance of either a revocation order or a cease and desist order is, to those who feel that "wilful" indicates intentional or deliberate action, a matter of great importance. Integrity of a code

member's record should not be marred by such a finding, unless and until this court has authoritatively determined that the term "wilful violation" as used in section 5(b) of the Act means something other than deliberate and intentional.

The questions suggested in this application directly affect the daily administration of the Bituminous Coal Act of 1937, and we sincerely believe should be definitely settled by this Court.

Respectfully submitted,

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APPENDIX.

Bituminous Coal Act of 1937.

Section 4. II-(e).

No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: Provided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the continental United States.

Section 4. II-(j).

The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

Section 5-(b).

The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 3 (b) of this Act, may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has wilfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: Provided, That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

In making an order revoking membership in the code as in this subsection provided, the Commission shall specifically find (1) the day or days on which the violations occurred; (2) the quantity of coal sold or otherwise disposed of in violation of the code or regulations thereunder; (3) the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder; (4) the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal; (5) the amount of tax required to be paid by the code member as a condition to reinstatement to membership in the code as in subsection (c) hereof provided.

Section 6-(a).

All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 970

BINKLEY MINING COMPANY OF MISSOURI, PETITIONER

v.

DAN H. WHEELER, ACTING DIRECTOR,[1] BITUMINOUS COAL DIVISION, UNITED STATES DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The report of the examiner and the memorandum opinion and order of the Acting Director

[1] On September 10, 1942, respondent Dan H. Wheeler was appointed Director of the Bituminous Coal Division. Previously, he had served as Acting Director while the position of Director was occupied by Howard A. Gray. Although many of the administrative actions in the proceedings herein involved had taken place before respondent Dan H. Wheeler assumed his present office, for convenience all action by the head of the Division is referred to in this brief and in our brief in No. 971 as action of the Director.

of the Bituminous Coal Division approving and adopting the report of the examiner are set forth in the record (R. 116–123, 140–148). The opinion of the Circuit Court of Appeals (R. 153–169) is reported in 133 F. (2d) 863.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 170) was entered on March 5, 1943. The petition for writ of certiorari was filed on April 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The petition appears to raise two basic questions:

1. Whether the court below properly affirmed the refusal of the Director of the Bituminous Coal Division to terminate a proceeding on a complaint which alleged willful violations by petitioner of the minimum price provisions of the Bituminous Coal Act and the Bituminous Coal Code, and which was filed pursuant to Sections 4 II (j) and 5 (b) of the Act by Bituminous Coal Producers Board for District No. 15, where the District Board subsequently sought termination of the proceeding by withdrawal or dismissal of the complaint.

2. Whether the court below properly affirmed the order of the Acting Director holding that the

petitioner "willfully" violated certain minimum price provisions of the Act and Code and directing it to cease and desist from further violation.

STATUTE INVOLVED

The pertinent provisions of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, 15 U. S. C., sec. 828 et seq., as amended, are set forth in the appendix, *infra,* pp. 19–22.[2]

STATEMENT

On June 12, 1941, the Bituminous Coal Producers Board for District No. 15 (hereafter called District Board 15) filed a complaint with the Bituminous Coal Division, pursuant to the provisions of Section 4 II (j) and 5 (b) of the Act, alleging that petitioner, through a subsales agent, made certain sales of coal to Western Tablet and Stationery Company at prices less than the applicable minimum prices established by the Division, and thus willfully violated the provisions of the Bituminous Coal Code and rules and regulations issued thereunder (R. 10–14). The complaint requested that the Division either revoke the code membership of petitioner or in its discretion direct petitioner to cease and desist from further violations. On July 12, 1941, a hearing on the complaint was scheduled for September

[2] The original Act has been extended by amendment, April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, sec. 849, and April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113.

10, 1941, in Kansas City, Missouri, and due notice was given to interested persons (R. 14–16). Personal service was made on petitioner (R. 17–18). Issue was joined when on August 2, 1941, petitioner filed an answer generally denying the allegations of the complaint (R. 18–19).

By motion, dated August 25, 1941, District Board 15 sought to withdraw its complaint and cancel the scheduled hearing (R. 19–24). The Director, observing that the proper administration of the Act required that the hearing be held, denied this motion September 5, 1941, without prejudice to petitioner's right to renew it at the close of the hearing (R. 24–25). The scheduled public hearing was thereupon held on September 10 and 11, 1941, before a duly designated examiner of the Division (R. 27–115). District Board 15 and petitioner appeared and filed a joint stipulation to dismiss the proceeding, which was referred to the Director (R. 26, 28). Upon complainant's refusal to introduce such evidence as it had in its possession (R. 28–35), a representative of the General Counsel's office of the Division obtained leave from the examiner to introduce evidence in the possession of the Division bearing upon petitioner's alleged violations (R. 35, 39). With respect to all such evidence which was introduced, petitioner fully exercised its right of cross-examination (R. 39–115). On February 25, 1942, the examiner submitted his report in which he

found that petitioner had willfully violated the provisions of the Act, the Code and the Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck. The examiner recommended that an order be entered requiring petitioner to cease and desist from further violations (R. 116–123).[3]

Petitioner filed exceptions (R. 127–131) to the report. The Director, on June 4, 1942, in a memorandum opinion and order (R. 140–148), denied the exceptions and approved and adopted the findings and conclusions set forth in the examiner's report. The following facts appear from the administrative findings and the undisputed evidence adduced at the hearing:

Petitioner, Binkley Mining Company of Missouri, operates the Bee-Veer Mine, designated as Mine Index No. 13, located in Macon County, Missouri, in District No. 15 (R. 2, 39). At all times pertinent to this proceeding, petitioner has been a member of the Bituminous Coal Code. It produces about half a million tons of coal a year (R. 96). Among the consumers of coal produced by petitioner is Western Tablet and Stationery Company (hereafter called Western), a corporation engaged in the manufacture of stationery items, whose main

[3] The report of the examiner treated this proceeding and the one involved in No. 971 in a single consolidated report because the transactions involved were similar and concerned the same producer. The Director followed the same procedure.

plant is located at St. Joseph, Missouri (R. 43). In the operations of this plant, Western annually consumes approximately 2,000 to 3,000 tons of bituminous coal (R. 44, 51, 79, 114). Part of this coal is used for processing glue and part for heating three plant buildings (R. 44–48, 67–69, 76, 87–88, 113). During the cold season, which generally extends from October through March of each year, approximately 20 percent of the coal consumed is used for processing glue, and the remaining 80 percent is used for space heating (R. 47, 74, 107–108, 112, 113). During that season, even on days when the plant is not operating, the boiler is kept going in order to maintain a temperature high enough to prevent the sprinkler system from freezing (R. 81). During the warm season, which generally extends from April through September, all the coal consumed is used for processing glue (R. 112–113). Approximately three tons of coal are used each day during the entire year for processing purposes (R. 79, 112). The plant generally operates 275 to 325 days a year; in 1940, it operated approximately 275 or 280 days (R. 79–80).

Between October 1, 1940 and March 31, 1941, petitioner, through its subsales agent, Binkley Coal Company, sold to Western approximately 540 tons of 1¼″ washed mill coal (designated in the applicable Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck as Size Group 13) at a price of

$1.63 per net ton f. o. b. its Bee-Veer Mine (R. 57–59, 92). This coal was sold pursuant to a contract entered into on April 1, 1940, for a term of thirty days, renewable each thirty days and terminable upon the establishment of minimum prices under the Act, or March 31, 1941, whichever occurred first; in accordance with the rules and regulations of the Division and Section 4 II (e) of the Act, the contract was made subject to all the provisions of the Act and specifically provided that where minimum prices were established under the Act, the contract might be renewed at the then effective minimum prices (R. 51–55).

It had been petitioner's practice, even before minimum prices were established by the Division, to sell coal to domestic and commercial consumers at prices different from those applicable to industrial consumers (R. 93–95). At the time the contract was executed, petitioner considered Western an industrial consumer in accordance with the classification embodied in the price list of Southwestern Coal Company, the marketing agency of which petitioner was a member and through which it sold its coal (R. 86–87, 92–95). The rules of that agency provided that consumers using fuel each day for processing and manufacturing, were to be classified as industrial consumers (R. 87). The minimum price schedule promulgated by the Division pursuant to the

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price provisions of the Act, which became effective October 1, 1940, also provided for classification of consumers in accordance with the marketing practice of the region in which petitioner marketed its coal. The Division's classification of consumers, however, was more rigorous; in order that the industrial classification might apply, not only must the fuel be needed each day of the year when products of the consumer are produced, but it must be used principally for the purpose of manufacturing or processing.[4]

In the light of this price instruction, the applicable minimum price for 1¼″ washed mill coal produced at petitioner's mine and sold to Western principally for space heating use in its St. Joseph plant was $1.75 per ton f. o. b. the

[4] So far as here pertinent, Price Instruction No. 9 of the Division's minimum price schedule provides:

"PART I—DOMESTIC AND COMMERCIAL USE AND INDUSTRIAL USE

"(a) Prices shown for Domestic and Commercial Use apply (1) on all sales in retailing of coal. (2) On all sales of coal to consumers using coal principally for space heating. (3) On all other sales except Industrial Use and as provided for in Part II Special Purpose Use and Part III Railroad Locomotive Fuel Use.

"(b) Prices in the Industrial Use Schedule apply only where sale is made by the Producer Code Member, his authorized agent, or a registered wholesaler or jobber and where the coal moves direct from the mine of the producer to the consumer using the fuel principally for (1) the purpose of driving steam engines or turbines. (2) The purpose of manufacturing or processing if fuel is required each day of the year products of the consumer are produced."

mine, the minimum price applicable during the period involved for coal sold for domestic and commercial use, rather than industrial use (R. 122, 146–147). The price of $1.63 per ton f. o. b. the mine, at which petitioner sold the coal in question, was the minimum price then applicable to coal sold for industrial use.

William G. Gregory, vice president of petitioner and of its subsales agent, Binkley Coal Company, and general manager of petitioner's Western Division, who was directly in charge of the sale of petitioner's coal to Western during the period in question (R. 91–94), was at that time and still is an active member of District Board 15. He stated he was familiar with the Schedule of Effective Minimum Prices for District No. 15, the Marketing Rules and Regulations promulgated by the Division and particularly the provisions of Price Instruction No. 9 (R. 93). When the schedules of effective minimum prices became effective October 1940, petitioner sent copies of the Division's rules and regulations, prices, and incidental information to all its salesmen advising them to study such rules and provisions carefully and to comply with the law in every respect (R. 96). Thomas E. Ziph, a salesman under Gregory's supervision who represented petitioner in its transactions with Western, was likewise aware of the price schedule, price instruction, and the marketing rules of the Divi-

sion (R. 88). Ziph testified that it was his understanding "that the larger portion of the coal that they [Western] use [in the St. Joseph plant] was for heating their buildings" (R. 87, 88, 119, 146–147). Notwithstanding Ziph's knowledge of Price Instruction No. 9, and the fact that he called on Western once every two or three weeks (R. 84), he made no inquiry or investigation to determine whether Western was an industrial user of coal within the meaning of the price instruction and the applicable rules and regulations of the Division (R. 119, 146).

Under these circumstances, the Director found that petitioner should have sold its 1¼" washed mill coal to Western at $1.75 per ton f. o. b. the mine rather than $1.63 per ton f. o. b. the mine, in view of the fact that the coal was used principally for domestic or commercial purposes. He found that petitioner's failure "to make any effort to determine the use to which the coals were to be put" amounted to a "wilful disregard" of its obligations (R. 147). He accordingly found that petitioner's violation was willful within the meaning of the Act.

The Director likewise held that upon the filing of the complaint by District Board 15, the jurisdiction of the Division was invoked to determine whether or not willful violations of the Act had been committed. Despite the desire of District Board 15 to withdraw its complaint or to have

the proceeding dismissed, the Director held that the Division could properly proceed to determine the issues raised in the complaint. Pointing out that where a district board fails for any reason to take action authorized or required by the Act, Section 6 (a) empowers the Divison to take such action in lieu of the district board, the Director held that it was proper for representatives of the Division to participate in the proceeding and to assure a full exploration and development of the issues and pertinent evidence. (R. 143, 144.)

The Circuit Court of Appeals affirmed the order of the Director requiring petititioner to cease and desist from further violations (R. 152–170). The Court pointed out that there is a "public interest in the enforcement of the requirements of the Act" and that neither "the petitioner nor the local board nor both in concert could control the public interest by stipulation or dismissal" (R. 165, 166). The court further held that the "finding that petitioner committed the violation as charged is sustained by the evidence" (R. 166), and concluded that there was, likewise, substantial evidence to support the finding that the violation was "wilful" within the meaning of the Act (R. 169).

ARGUMENT

1. The first question raised by the petition is whether the court below properly held that the Director of the Division was authorized to con-

tinue a proceeding instituted upon complaint of District Board 15 to investigate and redress alleged willful violations of the minimum price provisions of the Act and Code, despite the fact that the Board subsequently sought to have the complaint dismissed or withdrawn. Petitioner urges that a complainant's right to withdraw a complaint is "individual and private" (Pet. 10) and may be exercised "at any time prior to judgment" (Pet. 11). When so exercised, petitioner contends, the Division lacks power to continue the proceeding.

The same contentions were repeatedly made by petitioner and rejected by the examiner, the Director and the court below. They ignore the fundamental fact that, although the Bituminous Coal Act of 1937 contemplates a high degree of industrial self-regulation, Congress has designated the Division as the ultimate guardian of the public interest, *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 387, 399. It is the Division which maintains surveillance over the members of the Code as well as over the District Boards. It is the Division which has the responsibility of reconciling frequently conflicting interests among competitors, of giving adequate protection to consumers and of administering and enforcing the Act so as to protect the interests of the public and to effectuate the Congressional objectives. Consequently, in a proceeding aimed at the enforcement of the minimum price provisions of the Act, no less than in a pro-

ceeding aimed at determining the scope of their applicability, there are "other interests than those of the petitioner" involved and the Division is clearly not required to permit such interests to go unheeded. See *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 105 F. (2d) 559, 566 (C. C. A. 8th), certiorari denied, 308 U. S. 604, rehearing denied, 308 U. S. 638. Refusal to dismiss a proceeding against a violator may, as here, vindicate the interests of all those directly or indirectly affected by price-cutting activities.

This Court has observed that rules developed in purely private litigation frequently have limited relevance in administrative proceedings for the protection of the public interest. See, *e. g., National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362–363; *Phelps Dodge Corporation* v. *National Labor Relations Board,* 313 U. S. 177, 193; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–144. In a proceeding designed to safeguard the integrity of the minimum price schedules promulgated by the Division and thus to protect competitors and the general public from unregulated competition and discrimination, there is little reason to regard a complaint filed by a District Board in the same light as a private pleading.[5] In

[5] The right of a private litigant to abandon his action, over his adversary's objection, has not infrequently been limited by statute or court rule. See, *e. g.,* Rule 41 (a) of the Rules of Civil Procedure for the District Courts of the United

view of the fact that the District Boards are expressly authorized in Sections 4 II (j) and 5 (b) of the Act to file complaints alleging willful violations of the Code, and that the Division is authorized by Section 6 (a) to take action in lieu of the District Board when it fails to act "for any reason," it seems clear that the complaint filed pursuant to Sections 4 II (j) and 5 (b) of the Act "merely sets in motion the machinery of an inquiry" and that the subsequent fate of the inquiry is not limited by the desires of the complainant. Cf. *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, October Term 1942, No. 73, p. 6; see also *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, 105 F. (2d), 559, 565–566 (C. C. A. 8th), certiorari denied, 308 U. S. 604, rehearing denied, 308 U. S. 638; *Resources Corporation International* v. *Securities and Exchange Commission*, 103 F. (2d) 929, 932 (App. D. C.); *Oklahoma-Texas Trust* v. *Securities and Exchange Commission*, 100 F. (2d) 888, 892 (C. C. A. 10th); *Securities and Exchange Commission* v. *Hoover*, 25 F. Supp, 484 (N. D. Ill.); Cf. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1.[6]

States; *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230.

[6] Once District Board 15 indicated to the Division that it was unwilling to participate in a proceeding against a company producing coal within the District, the vice president of which was a member of the Board itself, the Division was clearly empowered to continue with a hearing which it deemed necessary to the effective enforcement of the Act. At

The Division's function in vindicating the public interest is emphasized by a number of factors: complaints under sections 4 II (j) and 5 (b) may be lodged by a variety of agencies, private or public; the notice to the alleged violator is the Division's notice, based on a complaint consisting of a filled-in form furnished by the Division (R. 10–14, 14–16); the sanctions provided by section 5 (b)—suspension of code membership or an order to cease and desist—go beyond the mere redress of a private grievance; and the Division is charged in section 5 (b) with the responsibility of bringing proceedings in court to enforce any order that it may enter. Cf. *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261.

2. Petitioner also challenges the conclusion of the court below that the Director's finding that petitioner had willfully violated the minimum price provisions of the Act is supported by substantial evidence. Petitioner does not deny that the evidence introduced at the hearing established that it sold a substantial quantity of coal at less than the applicable minimum price estab-

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such a hearing it was appropriate that a representative of the Office of the General Counsel participate. Such a course has been recommended to the Attorney General's committee by staff members preparing a monograph of the activities of the Division: "Active participation by the Division counsel, at least to assure a full record after the required complaint has put the agency's machinery in motion, would seem preferable to abandonment of public rights to private prosecution." Sen. Doc. No. 10, Part 10, 77th Cong., 1st Sess., p. 46 (1941).

lished in the price schedules duly promulgated by the Division (Pet. 12). Petitioner argues, rather, that the violation was not shown to have been "willful." As this Court has recently pointed out, " 'willful' * * * is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U. S. 492, 497. When employed in criminal statutes, particularly those involving moral turpitude, the word is generally used to mean with evil purpose or criminal intent. *United States* v. *Murdock,* 290 U. S. 389, 394, and cases cited. But when used in denouncing acts not conventionally reprehensible in themselves, the term has been held to denote that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and is employed to characterize "conduct marked by careless disregard for whether or not one has the right so to act." *United States* v. *Illinois Central Railroad Co.,* 303 U. S. 239, 243; *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69, 71 (C. C. A. 8th). In other circumstances, willfulness involves a mere failure to observe a known statute by reason of indifference, inadvertence, or negligence. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 85, 86; *Powell* v. *United States,* 112 F. (2d) 764 (C. C. A. 4th); *Boston & M. R. R.* v. *United States,* 117 F. (2d) 428 (C. C. A. 1st); *Arrow Distilleries* v. *Alexander,* 109 F. (2d) 397, 406 (C. C. A. 7th), certiorari denied, 310 U. S. 646.

To avoid a tax of 19½ percent on sales of the coal which it produced, petitioner accepted membership in the Bituminous Coal Code and undertook to observe the minimum prices and regulations established by the Division. Despite the fact that its responsible employees were aware of the requirements of the price schedule and the distinction made by Price Instruction No. 9 between coal sold for domestic or commercial use and coal sold for industrial use, and despite the fact that petitioner had adequate opportunity to ascertain by simple inquiry the character of Western's use of the coal which it purchased, petitioner made no attempt to determine the appropriate minimum price for its sales to Western. Finding that "proper enforcement of the Act would be impossible" if producers were permitted to sell coal without determining the use to which the coals are to be put where such use affects the applicable minimum price, the Director held that petitioner's violations were to be regarded as "Wilful" in the context of the Bituminous Coal Act of 1937 (R. 147). The court below (R. 168) confirmed the Director's judgment that in the Act the term "wilful" did not require evil or criminal purpose but, rather, was designed to described the attitude of a member of the Code "skilled in the coal selling art and familiar with its practice, who, having a free will and choice, intentionally and knowingly either omits to do what is required of him * * * or acts * * *

with manifest indifference" to the obligations of code membership. In so holding, the court followed established rules of construction and principles governing judicial review of administrative orders. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Gray* v. *Powell,* 314 U. S. 402.[7]

CONCLUSION

The judgment below is correct and is in accordance with the decisions of this and other courts. The petition for certiorari should be denied.

Respectfully submitted.

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[7] Although the court criticised the form of the administrative findings, it recognized that they are legally sufficient. See *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 428; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 294 U. S. 499; *National Labor Relations Board* v. *Swift & Co.,* 116 F. (2d) 143, 145 (C. C. A. 8th); *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 560 (App. D. C.).

APPENDIX

The pertinent provisions of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, 15 U. S. C., sec. 828 et seq., as amended, are as follows:

4 II (j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

* * * * *

5 (b) The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 3 (b) of this Act may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has

willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: *Provided,* That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

* * * * *

SEC. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivi-

sion thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

* * * * *

(c) If any code member fails or neglects to obey any order of the Commission while

the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. * * *

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